Supreme Court, U.S.
FILED
25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1688

PETER MARCELLO,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CHARLES J. BLOOM
2001 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109
(215) 893-3000

Counsel for Petitioner

Of Counsel:
WILLIAM A. DESTEFANO
ANNE M. WHATLEY
PEPPER, HAMILTON & SCHEETZ
2001 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109
(215) 893-3000

SIGMUND L. BLOOM
319 7th N.W.
Albuquerque, NM 87102
(505) 247-0774

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. The Panel's Opinion Conflicts in Principle With Prior Decisions of This Court and a Decision of the Court of Appeals for the First Circuit Concerning the Circumstances Under Which an Officer May Detain and Question a Suspect Without a Warrant or Probable Cause	8
II. This Case Presents an Opportunity for the Court to Resolve a Conflict Among the Circuits by Clarifying the Type and Quantum of Corroboration Necessary to Constitute Reasonable Suspicion Justifying an Investigative Stop or to Constitute Probable Cause Justifying an Arrest or Search in Anonymous Tip Cases Where There Is Nothing to Indicate the Reliability of the Informant and There Is No Verification That a Crime Has Been Committed	14
CONCLUSION	21
APPENDIX:	
Court of Appeals Opinion	A1
Court of Appeals Judgment	A7
Court of Appeals Order Denying Rehearing	A9
District Court Judgment and Probation/Commitment Order	A11
District Court Letter Opinion Denying Motions to Suppress Evidence	A12
District Court Order Denying Motions to Suppress Evidence (12/17/76)	A14
District Court Order Denying Motions to Suppress Evidence (2/11/77)	A15

TABLE OF CITATIONS

Cases: Page

Adams v. Williams, 407 U. S. 143 (1972) 8, 14, 15, 20
Aguilar v. Texas, 378 U. S. 108 (1964) 14, 15, 16
Brown v. Illinois, 422 U. S. 590 (1975) 11, 13
Delaware v. Prouse, — U. S. —, 99 S. Ct. 1391 (1979) 8, 10
Dunaway v. New York, — U. S. —, 99 S. Ct. 2248 (1979) 8, 9, 10, 11, 12, 13
Miranda v. Arizona, 384 U. S. 436 (1966) 9, 10
Spinelli v. United States, 393 U. S. 410 (1969) 14, 15, 16
Terry v. Ohio, 392 U. S. 1 (1968) 8, 9, 10, 11, 15, 16, 20
United States v. Andrews, 600 F. 2d 563 (6th Cir. 1979), cert. denied, — U. S. —, 100 S. Ct. 166 (1979) 16, 17
United States v. Baker, 577 F. 2d 1147 (4th Cir. 1978) 18
United States v. Brignoni-Ponce, 422 U. S. 873 (1975) 8, 10
United States v. Jackson, 533 F. 2d 314 (6th Cir. 1976) 18
United States v. Larkin, 510 F. 2d 13 (9th Cir. 1974) 19
United States v. Marcello, 570 F. 2d 324 (10th Cir. 1978) 3
United States v. Martinez-Fuerte, 428 U. S. 543 (1976) 8
United States v. McLeroy, 584 F. 2d 746 (5th Cir. 1978) ...16, 17
United States v. Miller, 589 F. 2d 1117 (1st Cir. 1978), cert. denied, 440 U. S. 958 (1979) 10, 11, 13
United States v. Rasor, 599 F. 2d 1330 (5th Cir. 1979) 19
United States v. Smith, 598 F. 2d 936 (5th Cir. 1979) 19
Whiteley v. Warden, 401 U. S. 560 (1971) 14, 19

Statutes:

18 U. S. C. § 2 3
18 U. S. C. § 2312 3
28 U. S. C. § 1254(1) 2

Miscellaneous:

The Fourth Amendment to the Constitution of the United States 2, 9, 20
The A. L. I. Model Code of Pre-Arraignment Procedure § 201(3) and commentary at 91 Tentative Draft No. 1, 1966 12

IN THE

Supreme Court of the United States

October Term, 1979

No.

PETER MARCELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner Peter Marcello respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 20, 1980.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit, not reported and marked not for routine publication, appears in the Appendix hereto, pp. A1-A6. The unreported letter opinion of the United States District Court for the District of New Mexico, denying Petitioner's Motion to Suppress Evidence and the Orders of that Court dated December 17, 1976 and February 11, 1977 denying Petitioner's Motions to Suppress Evidence are also reproduced in the Appendix hereto, pp. A12-A15.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on February 20, 1980. A timely petition for rehearing was denied on March 27, 1980, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a prearranged stop on the highway of a suspect followed by the retention of his driver's license and vehicle registration, the removal of the suspect and the vehicle to a police station, the interrogation of the suspect and search of the vehicle at the police station constitutes a sufficiently intrusive seizure to require a warrant or probable cause under the Fourth Amendment to the United States Constitution.

2. Whether the Fourth Amendment to the United States Constitution sanctions a warrantless detention and questioning of an occupant of a motor vehicle and a warrantless search and seizure of the vehicle where the basis for those intrusions was an anonymous telephone call received three days prior thereto and where the authorities had no basis on which to determine the identity or the reliability of the caller and did not corroborate the caller's claim that a crime had been committed or that the suspect was engaged in criminal activity.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner was charged with the interstate transportation of a stolen motor vehicle and aiding and abetting in violation of 18 U. S. C. §§ 2312 and 2. He filed pretrial motions to suppress evidence obtained as a result of a warrantless search and seizure of the vehicle by the New Mexico State Police on October 27, 1976, and to suppress an in-custody statement given by Petitioner at that time. The motions were denied, App. A14-A15, and Petitioner proceeded to trial in December of 1976. A mistrial was declared when the jury was unable to reach a verdict. At the second trial, Petitioner was convicted and was subsequently sentenced to a five year jail term.[1]

The evidence inculpating Petitioner in the crimes charged was discovered as a result of a seizure of Petitioner and the vehicle on October 27, 1976. The impetus for the seizure was supplied by two anonymous telephone tips. On October 5, 1976, FBI agent John Gaffney of Babylon, New York received the first anonymous telephone call. He was informed that Petitioner was a former resident of New York and was operating a garbage dis-

1. Petitioner's second trial was delayed until 1978 by the government's notice of intent to use additional evidence which it obtained through a search of Petitioner's place of business on October 29, 1976. The trial court entered an order suppressing such evidence and the government appealed to the United States Court of Appeals for the Tenth Circuit. The decision of the district court was reversed by the Court of Appeals on February 8, 1978 in *United States v. Marcello,* 570 F. 2d 324 (10th Cir. 1978).

posal business in Albuquerque, New Mexico, the A-1 Carting Company. The caller also gave the telephone number of the company and claimed that Petitioner was using equipment in his business that had been stolen in New York and transported to New Mexico. The substance of the tip was received by Albuquerque resident FBI agent James Doyle on October 18, 1976. Agent Doyle subsequently verified only some of the wholly innocent information given by the anonymous informant—that Petitioner operated the A-1 Carting Company in Rio Rancho, New Mexico, an Albuquerque suburb, and that the telephone number given by the anonymous caller was that of the company. Agent Doyle never sought to corroborate the claim of the anonymous caller that Petitioner was using stolen equipment in his business, nor did he ever receive any information indicating that the anonymous informant was reliable.

On October 24, 1976, another anonymous telephone call was received by the New Mexico State Police. The caller claimed that Petitioner was in New York, was in possession of a repainted stolen garbage truck with altered serial numbers and would be driving the truck to New Mexico, arriving there on or about October 27, 1976. The substance of this anonymous call was conveyed to Agent Doyle who telephoned the residence of Petitioner in the early afternoon of October 27 and was advised that Petitioner was "out of the Albuquerque area" and "would return on October 27, 1976." Agent Doyle then contacted the New Mexico Port of Entry at San Jon [2] and requested that he be advised if a garbage truck driven by Petitioner passed through the Port of Entry. Significantly, during the three days between the date the anonymous telephone

2. San Jon is located in New Mexico on highway I-40 approximately 20 miles from the Texas border and approximately 226 miles from Albuquerque.

call was received by the state police and the time that Agent Doyle made his request to the New Mexico Port of Entry, no effort was made to ascertain the identity or the reliability of the anonymous caller(s) and no effort was made to determine whether a crime had been committed or whether Petitioner could have been involved. In fact, at no time prior to the stop did Agent Doyle or any other law enforcement officer even attempt to verify that a garbage truck had been stolen in New York.

At approximately 5:10 p.m. on the evening of October 27, 1976, Port of Entry personnel notified Agent Doyle that Petitioner, driving a green garbage truck, had checked in at the Port of Entry, and was en route to Albuquerque. Agent Doyle then contacted the New Mexico State Police, related the substance of the above information and requested that they patrol the access roads to the Albuquerque area on the lookout for the truck.

At about 10:30 p.m. that night, New Mexico State Police Officer A. C. Rodrigues, who had been alerted by the FBI and "was looking for a trash truck" pursuant to the FBI's request, stopped the truck.[3] Rodrigues testified that he was traveling in the opposite direction when he first sighted the truck, and made a U-turn to pursue it. He followed the truck for a short distance in order to find a suitable spot to pull it over, and while doing so, he observed that the license plate was covered with slush and snow and that the rear license plate light "may have been out." Rodrigues never claimed to have stopped the truck because of these factors, and he would have stopped

3. Rodrigues' patrol car was one of the four vehicles on the road that evening looking for the truck pursuant to the tip and the request of Agent Doyle. The other vehicles were driven by Sergeant Whitehouse of the New Mexico State Police, Agent DiSilva of the FBI and Agent Doyle. All were in radio contact during the relevant time.

the truck without regard to them.[4] Thus, there can be no claim that the truck was stopped as the result of routine enforcement of the New Mexico Motor Vehicle Code.

After pulling the truck off to the side of the road, Rodrigues asked for and was provided with Petitioner's license and the truck's registration card. He then retained Petitioner's license and registration card and "requested" Petitioner to accompany him to the State Police Barracks.[5] At the barracks, Petitioner was advised of his constitutional rights and was questioned by Agent Doyle who was also patroling the area but proceeded directly to the barracks after being advised that the truck had been stopped. After questioning, Petitioner was released. Possession of the truck was retained, however, and searches conducted later that evening and again on the following day disclosed information which conflicted with Petitioner's statement and eventually led to the identification of the truck as one which was stolen in New York on October 23, 1976.

Petitioner's motions to suppress his statement and the other evidence discovered as a result of his detention and

---

4. Q. (By counsel for defendant) Now, when you stopped the truck you would have stopped it whether or not the white license tag light was on, wouldn't you have?

A. (Officer Rodrigues) Yes, sir, to check it out, yes sir.

Q. And the fact that you say that you didn't remember the license tag white light being on, that doesn't really make any difference because you would have stopped the truck if the tag was okay, wouldn't you have?

A. I would have stopped it to check it out because we were very curious that the trash truck would be out in the canyon, you know.

Transcript of Hearing on Motions to Suppress, December 7, 1976, at 119-120.

5. Petitioner rode in one of the two police cars and an employee of Petitioner who was driving the truck at the time of the stop drove the truck to the barracks. Officer Rodrigues and Sergeant Whitehouse maintained a caravan arrangement en route to the barracks with the truck in the middle.

the seizure of the truck were denied and the evidence was introduced at trial.[6]

On appeal, a Panel of the United States Court of Appeals for the Tenth Circuit held, without citation to authority, that the tip was sufficiently corroborated to justify the stopping of the truck and that Petitioner was not under arrest. App. A3.

---

6. The evidence obtained as a result of the searches of the truck on October 27 and 28 and the information provided by Petitioner during interrogation on October 27 were also used to support an Affidavit for a warrant to search property leased by Petitioner. The warrant was issued and a search conducted on October 29 uncovered additional evidence which was admitted into evidence at Petitioner's second trial (see note 1 *supra*).

REASONS FOR GRANTING THE WRIT

I. The Panel's Opinion Conflicts in Principle With Prior Decisions of This Court and a Decision of the Court of Appeals for the First Circuit Concerning the Circumstances Under Which an Officer May Detain and Question a Suspect Without a Warrant or Probable Cause.

In *Dunaway v. New York*, — U. S. —, 99 S. Ct. 2248 (1979), this Court held that investigative detentions and questioning which are not supported by the traditional standard of probable cause are justified only in the most carefully circumscribed situations. Cases in which such investigative seizures based only on "reasonable suspicion" have been approved include on-the-spot observations requiring swift action by the police: *Terry v. Ohio*, 392 U. S. 1 (1968), and *Adams v. Williams*, 407 U. S. 143 (1972); automobile stops by border patrols to investigate for illegal immigrants: *United States v. Brignoni-Ponce*, 422 U. S. 873 (1975); fixed checkpoint stops to investigate for aliens: *United States v. Martinez-Fuerte*, 428 U. S. 543 (1976); and stops predicated on observed or reasonably suspected motor vehicle or traffic violations: *Delaware v. Prouse*, — U. S. —, 99 S. Ct. 1391 (1979) (dictum). The facts of this case fit into none of the above-enumerated circumstances. Yet the Panel's opinion approved a warrantless detention, questioning and search which was predicated solely on an anonymous and otherwise not reliable telephone tip and the corroboration of only some of the innocent detail provided by the anonymous caller.

In *Dunaway*, petitioner was ordered to be picked up on the strength of information provided by a known informant. Such information admittedly fell short of prob-

able cause for an arrest but the State contended that petitioner was not arrested. He was not detained briefly where found but was requested to come to the police station where he was questioned after receiving the warnings required by *Miranda v. Arizona*, 384 U. S. 436 (1966). He was not booked or formally charged but he was never told that he was "free to go." The Court held that even though the police conduct fell short of a formal arrest, the seizure was by no means analogous to the narrowly defined intrusions involved in *Terry* and its progeny. The Court held further that "[i]ndeed, any 'exception' [to the probable cause standard] that would cover a seizure as intrusive as that in this case would threaten to swallow up the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." 99 S. Ct. at 2256.

The seizure involved in this case is analogous to that in *Dunaway*. FBI Agent Doyle requested the New Mexico State Police to intercept Petitioner and his truck on the highway near Albuquerque. Petitioner was not briefly detained and questioned where found, but instead, was requested to accompany the officer to the State Police Barracks. Petitioner was never advised that he was free not to do so, and the officer retained possession of Petitioner's license and the truck's registration card. En route to the barracks, Petitioner rode in the lead police car while another police car followed the truck. Indeed, Agent Doyle who was also looking for the truck on the night in question proceeded directly to the barracks after being advised of the stop, indicating that the detention of Petitioner at the police barracks had been prearranged and that Petitioner would have been taken forcibly to the barracks if he had not acquiesced in the officer's "request". Officer Rodrigues' retention of Petitioner's license

and the truck's registration card cannot be explained otherwise. Because Petitioner could not lawfully operate the truck without those papers, he was not free to go and, thus, was constructively under arrest.

In similar circumstances, the Court of Appeals for the First Circuit concluded that the retention of a suspect's license and registration by the police was such a restraint on a suspect's freedom of movement that the police activity constituted something akin to an arrest. *United States v. Miller*, 589 F. 2d 1117, 1127 (1st Cir. 1978), *cert. denied*, 440 U. S. 958 (1979). There the court held that probable cause must exist to support the "arrest", and that the lesser standard of reasonable suspicion could not justify such a detention. In this case the Panel held, in apparent conflict with *Miller*, that no arrest had occurred.

After his arrival at the State Police Barracks, Petitioner was advised of his *Miranda* rights. He was asked to sign a form waiver and was questioned "for about an hour" by Agent Doyle. As in *Dunaway*, Petitioner was not placed under formal arrest. Nevertheless, the intrusion portrayed above involves many of the trappings of a formal arrest and bears little resemblance to the brief street encounter approved in *Terry*, the less-than-a-minute encounter approved in *Brignoni-Ponce* and the usually brief highway encounter recognized as acceptable in *Delaware v. Prouse*. Moreover, none of the "exigencies" involved in the above-cited cases supporting the necessity of the "stops" are present here. The seizure was not necessary to prevent ongoing or continued criminal activity since, according to the tip, the alleged crime was complete. Nor was the intrusion necessary to prevent escape, or destruction of evidence since the police chose to wait for the truck to enter the Albuquerque area, approxi-

mately five hours after being advised that it passed the Port of Entry at San Jon, more than 225 miles away. Moreover, the officers had already verified that Petitioner maintained both his residence and place of business in the Albuquerque area. Their decision to wait for over five hours before stopping the truck is strong evidence that the police themselves believed that Petitioner was en route to his place of business and that there was no necessity for swift action. Under these circumstances, the failure of the FBI and the New Mexico State Police to attempt to obtain a warrant in the more than five hours before Petitioner was stopped is equivalent to their recognition that they could not make out the required showing of probable cause at that time.

In short, the nature of the intrusion here, is similar to that in *Dunaway* and *Miller,* and is not comparable to the narrowly defined intrusions approved by *Terry* and its progeny. This type of police conduct was condemned by the Court in *Dunaway* and criticized in *Brown v. Illinois,* 422 U. S. 590, 605 (1975), as an "expedition for evidence in the hope that something might turn up."

The Court's decision in *Dunaway* also makes clear that an inculpatory statement given as a result of or during an unlawful seizure or detention is inadmissible unless sufficiently attenuated by factors such as the passage of time or the presence of intervening circumstances breaking the causal connection between the seizure and the statement. In this case, however, there was no showing of attenuation by the government and no discussion of this issue by the lower courts. Instead, attempts to justify the "stop" focused solely on the anonymous tip and subsequent corroboration of wholly innocent detail. Moreover, the Panel apparently believed that the Petitioner's continued detention and questioning at the bar-

racks, and the subsequent search of the truck were justified by Petitioner's acquiescence in the officer's requests to come to the barracks and to leave the truck there after he had been released.

The Panel's finding of "consent", however, will surely be read by law enforcement officers as authority for the proposition that they may safely detain and question a suspect in virtually any situation without a warrant or probable cause—later to justify introduction into evidence of the fruits of the unlawful intrusion by asserting that such fruits were not the product of the intrusion itself but rather, a product of the consent of the suspect. This approach, however, was specifically rejected in *Dunaway* with respect to an inculpatory statement, and the same reasoning requires that it be rejected here with respect to Petitioner's acquiescence in the "requests" that he accompany the officers to the barracks and leave the truck there so that it might be "checked out further" at a later time.

The A. L. I. Model Code of Pre-Arraignment Procedure § 2.01(3) and commentary at 91 are particularly relevant. Tentative Draft No. 1, 1966 was cited with approval in *Dunaway,* 99 S. Ct. at 2253 n. 6: A "request to come to the police station 'may easily carry an implication of obligation, while the appearance itself, unless clearly stated to be voluntary, may be an awesome experience for the ordinary citizen.' " Here, the record demonstrates that the officers never advised Petitioner that he was free not to acquiesce in their "requests" and, in fact, the contrary is indicated by the officers' actions before and during the unlawful seizure. For example, can Agent Doyle's presence at the State Police Barracks or Officer Rodrigues' retention of Petitioner's license and registration be explained by anything other than their foreknowledge

that Petitioner would be brought to the Barracks without regard to his consent?

Moreover, there was ample time to seek and obtain a warrant for Petitioner's arrest or for the search and seizure of the truck. The authorities were advised that the truck had passed the Port of Entry at San Jon, New Mexico at 5:10 p.m. on October 27, 1976. They did not radio ahead and request that the truck be stopped at a point near San Jon, but rather chose to wait until the truck entered the Albuquerque area, approximately five hours later. Although the record is not explicit why a warrant was not sought, the only reasonable inference is that the authorities themselves felt, as in *Dunaway,* that they did not have sufficient information to constitute probable cause. This inference is further supported by the fact that although the anonymous tip came three days prior to the stop, no inquiry was ever made whether a garbage truck (or any other piece of equipment allegedly in Petitioner's possession) had been reported missing or stolen in the New York area as had been claimed by the anonymous caller(s).

On facts analogous to those of *Dunaway* and *Miller,* the Panel's decision in this case that the stop was justified and that Petitioner was not under arrest approves the very type of police conduct that constituted reversible error in *Dunaway* and *Brown,* and conflicts with the decision of the Court of Appeals for the First Circuit in *Miller.* Yet the Panel here held that the police conduct on the evening of October 27, 1976 amounted to no more than an investigative detention requiring something less than probable cause.[7] The conflict thus created by the Panel's decision requires the intervention of this Court.

---

7. As we show *infra,* the facts of this case do not rise even to the level of reasonable suspicion.

II. This Case Presents an Opportunity for the Court to Resolve a Conflict Among the Circuits by Clarifying the Type and Quantum of Corroboration Necessary to Constitute Reasonable Suspicion Justifying an Investigative Stop or to Constitute Probable Cause Justifying an Arrest or Search in Anonymous Tip Cases Where There Is Nothing to Indicate the Reliability of the Informant and There Is No Verification That a Crime Has Been Committed

In *Whiteley v. Warden*, 401 U. S. 560 (1971), the Court considered the nature and quantum of evidence sufficient to corroborate an anonymous tip and justify a warrantless arrest and incidental search and seizure of an automobile. Because the tip alone did not satisfy the requirements of *Aguilar v. Texas*, 378 U. S. 108 (1964), and *Spinelli v. United States*, 393 U. S. 401 (1969), the Court addressed the issue whether additional information gathered by the officers was sufficient to corroborate either the reliability of the informant or the informant's conclusion that the subject was connected with the crime. The Court held that since the additional information corroborated only the wholly innocent portions of the tip (the type of car driven by petitioner and the description of him and his companion) and did nothing to support either the informer's reliability or his conclusion that petitioner was engaged in criminal conduct, it was insufficient to justify the arrest or the incidental search and seizure.[8]

In *Adams v. Williams*, 407 U. S. 143 (1972), decided approximately one year after *Whiteley*, the Court had occasion to consider the nature and quantum of evidence necessary to corroborate a deficient informant's tip

8. The Court held, 401 U. S. at 567:

> [T]he additional information acquired by the arresting officers must in some sense be corroborative of the informer's tip that the arrestees committed the felony, or as in *Draper* itself, were in the process of committing the felony.

so as to provide reasonable suspicion for a forcible "stop and frisk." The impetus for the "stop" was information personally provided by a known informant who came forward "on the scene" to provide information, and who had provided information in the past. The Court held that the information supplied to the officer may have been insufficient to establish probable cause necessary for an arrest or search warrant, but carried enough "indicia of reliability" to justify a forcible stop.[9]

Adams makes clear that, in informant cases, tips found insufficient under the *Aguilar—Spinelli* test may, with additional information, satisfy the "reasonable suspicion" standard necessary for the minimal intrusion of a stop and frisk approved in *Terry*. *Adams* also held that deficient tips may be corroborated sufficiently to establish reasonable suspicion for a stop and frisk even though the same would not satisfy the "probable cause" standard necessary to justify the greater intrusion on personal liberty presented by a traditional arrest or search.

Since the informant in *Adams* was known and the additional information provided was found to have sufficient "indicia of reliability," the Court was not required to reach the issue of the corroboration necessary to create a reasonable suspicion of criminality where reliability cannot be determined. In the arrest context, this issue was decided in *Whiteley;* the Court has not, however, considered this issue in the context of investigative stops. Moreover, lower courts that have considered this issue have arrived

9. 407 U. S. at 147:

> [W]hile the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, *see, e.g., Spinelli v. United States* [citation omitted]; *Aguilar v. Texas* [citation omitted], the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.

at inconsistent and conflicting conclusions. This case provides an opportunity for the Court to resolve this inconsistency and conflict.

The conflict in the opinions of the various Circuits regarding the corroboration necessary to substantiate an otherwise deficient tip and create a reasonable suspicion of criminality is best illustrated by *United States v. Andrews,* 600 F. 2d 563 (6th Cir.), *cert. denied,* — U. S. —, 100 S. Ct. 166 (1979), and *United States v. McLeroy,* 584 F. 2d 746 (5th Cir. 1978). Both cases involved information supplied by a tip that failed to meet the *Aguilar—Spinelli* test. In both cases, however, law enforcement officers claimed to have sufficiently corroborated the tip by subsequent investigation to provide reasonable suspicion justifying an investigative stop.

In *Andrews,* the deficient tip was held to have been sufficiently corroborated essentially by two factors: (1) the officer knew that the individual alleged to have been the intended recipient of illegal drugs carried by the suspect had a reputation as a drug dealer; and (2) the officers observed a person meeting the description provided by the tipster at the place where the tipster said he would be.

In *McLeroy,* the tip was held not to have been sufficiently corroborated to justify a *Terry* stop where the police had only corroborated the tipster's information as to the suspect's address and his car's license number, had observed the suspect at the address and had observed an automobile described by the tipster near the suspect's home. The record contained nothing to identify the informant or to substantiate his reliability, and the additional information obtained by the officers was found to be readily available to many persons. The court held that because the additional information was "so slight", and

did not suggest that the informant could have known that McLeroy was involved in a crime, the tip was not sufficient to provide reasonable suspicion of criminality.

While the court in *Andrews* attempted to distinguish *McLeroy,* the confusion resulting from the differing analyses is apparent. In both cases there was no additional information that revealed the identity or reliability of the informant or that a crime had been or was being committed.[10] Yet the Fifth Circuit found no basis for a reasonable suspicion, while the Sixth Circuit upheld the validity of the stop.

Here, the Panel simply held that the anonymous tip was sufficiently corroborated to justify the stopping of the truck. The only "corroborative" information obtained by the officers, however, was that Petitioner owned a garbage disposal business, that he was out of town and would return on October 27 and that the truck was observed stopping at a New Mexico Port of Entry, App. A2. As in *McLeroy,* and *Andrews* there is no evidence in the record of the identity or reliability of the informant. Also, the "corroborative" facts obtained by the officers related only to information readily available to many persons. None of the known facts suggested criminal conduct. The tip here would clearly be insufficient under the analysis of *McLeroy.* In addition, unlike *Andrews,* there was no added factor present in the record that could arguably indicate reasonable suspicion of criminality; the Panel, however, found the anonymous tip sufficiently corrobo-

10. As stated above, the court in *Andrews* held that knowledge of the reputation of the alleged recipient of the drugs as a drug trafficker was an additional factor significant to the court's determination that reasonable suspicion of criminality existed. This factor would be of no or little significance under the *McLeroy* analysis since it did not suggest that the informer knew personal facts about Andrews and such knowledge of a third-party's reputation would, most likely, be readily available to many persons.

rated by these innocent facts. Thus, the Panel's opinion adds more confusion to the already perplexing issue of the verification necessary to substantiate a deficient tip for the purpose of creating a reasonable suspicion of criminality.[11]

This confusion among the Circuits is also apparent in cases involving arrests and searches. In *United States v. Baker,* 577 F. 2d 1147 (4th Cir. 1978), the court held, on an alternative basis, that a tip from a known informant who was not shown to be reliable was sufficiently corroborated to provide probable cause to arrest a suspect. The court discussed whether the deficient tip could be corroborated by substantiation of innocent detail. Prior to citing the many opinions on this issue, particularly cases from the Court of Appeals for the Second Circuit, the court noted, 577 F. 2d at 1150 n. 10:

> There is some contraiety in the decisions on whether the corroborating facts may be innocent facts conforming to the information in the tip or must be facts which "relate directly to the criminal activity." *See United States v. Brennan* (5th Cir. 1976) 538 F. 2d 711, 720, n. 11, *cert. denied,* 429 U. S. 1092, 97 S. Ct. 1104, 51 L. Ed 2d 538.

Finding that the law enforcement officers had obtained additional facts which related to criminal activity, the court held that the tip was sufficiently corroborated even if the "stricter" standard requiring corroboration of facts relating to criminal conduct were applied. *Id.*

In *United States v. Jackson,* 533 F. 2d 314 (6th Cir. 1976), a tip provided by a known informant whose re-

11. Corroboration of criminal conduct would have posed little difficulty to the law enforcement officers in this case. The law enforcement officers had ample time after the receipt of the anonymous tip on October 24, 1976, to make at least the minimal inquiry whether a garbage truck had been reported missing or stolen in the New York area as claimed by the anonymous caller(s).

liability was not established was held not sufficiently corroborated to provide probable cause for arrest. Since the law enforcement officers had corroborated only innocent details, the court found the additional data insufficient because it failed to "confirm that the arrestee committed the felony or was in the process of committing the felony," 533 F. 2d at 318, citing *Whiteley*, 401 U. S. at 567. *United States v. Larkin*, 510 F. 2d 13 (9th Cir. 1974), also addressed the issue whether a tip from an informant whose reliability was not established had been sufficiently corroborated. The court held that corroboration of "innocuous details," including the description of the vehicle in which the suspect was riding and the direction that it was traveling, did not provide a basis for probable cause to search the vehicle. More recently, *United States v. Smith*, 598 F. 2d 936 (5th Cir. 1979), held that an anonymous tip from an informant whose reliability was not shown was not sufficiently corroborated to justify an arrest. Although the court stated that a tip containing a wealth of detail may be sufficiently corroborated by substantiation of innocent detail, the detail in *Smith* was of "a public nature" and was held insufficient to substantiate the deficient tip, 598 F. 2d at 940. *Accord, United States v. Rasor*, 599 F. 2d 1330 (5th Cir. 1979).

Here the facts corroborated by the law enforcement officers related to innocent conduct, were "readily available" and were of a "public nature." Thus, there is a substantial question whether such corroboration is sufficient to create either a reasonable suspicion of criminality to justify a stop or probable cause to justify an arrest. The opinions of the Courts of Appeals cited above on this issue reveal inconsistent analyses and, absent resolution of the question by this Court, there are no clear guidelines to assist them in reaching proper conclusions.

In 1972 this Court in *Adams* declined to provide a "simple rule" for determinations of whether an informant's tip warrants an investigative stop. The confusion evidenced by the opinions of the various Circuits illustrates the present need for guidance in the area. A development of the law in this area by the Court would be consistent with the Court's recent opinions clarifying the instances in which a *Terry*-type intrusion is appropriate, would assist police officers in determining the proper response to deficient tips in making investigative stops, arrests and searches and would ensure the protection of individual liberty guaranteed by the Fourth Amendment.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit on the questions presented herein.

Respectfully submitted,

CHARLES J. BLOOM
2001 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109
(215) 893-3000
Counsel for Petitioner
Peter Marcello

Of Counsel:
WILLIAM A. DESTEFANO
ANNE M. WHATLEY
PEPPER, HAMILTON & SCHEETZ
2001 Fidelity Building
Philadelphia, PA 19109
(215) 893-3000

SIGMUND L. BLOOM
319 7th N.W.
Albuquerque, NM 87102
(505) 247-0774

Appendix.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1538

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PETER MARCELLO,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D. C. No. CR 76-226)

SLIP OPINION.

(Filed February 20, 1980.)

Don J. Svet, Assistant United States Attorney (R. E. Thompson, United States Attorney, with him on the brief) for Plaintiff-Appellee.

Sigmund L. Bloom (Marchiondo & Berry, P. A. and Tabet & Bloom, with him on the briefs) for Defendant-Appellant.

Before DOYLE, BREITENSTEIN and LOGAN, *Circuit Judges.*

BREITENSTEIN, *Circuit Judge.*

After a jury trial, defendant-appellant Marcello was convicted of the interstate transportation of a stolen motor

vehicle in violation of 18 U. S. C. § 2312. On this appeal from the United States District Court for the District of New Mexico, he urges evidentiary errors and prosecutorial misconduct. We affirm.

Defendant owned and operated in New Mexico a private garbage service known as A-1 Disposal. In August, 1976, he purchased a burned out 1973 Peterbilt truck at an auction. He registered the vehicle and obtained license plates for it. Also he obtained a brake and light sticker dated October 22, 1976 although he did not present the vehicle for inspection.

An Albuquerque official testified that the City had a 1973 Peterbilt which had been damaged in a fire and sold to defendant at an auction. A salvage dealer testified that defendant had brought to him parts of a damaged Peterbilt truck, some of which were sold for defendant. A filling station operator testified that he had given defendant an inspection sticker without examining the vehicle.

In August, 1976, Michael Antonacci, the operator of a private sanitation business in New York, purchased a 1976 Crane Carrier from a local dealer for $66,000. On October 22 or 23 the truck was stolen from the lot where an employee of Antonacci had parked it for the night. The lot was located a few blocks from the 3-M Carting Company for which defendant had worked before moving to New Mexico.

On October 24, the New Mexico State Police received an anonymous tip that defendant was in New York to obtain a stolen garbage truck, would leave there on October 25, and arrive in New Mexico on October 27. Investigation revealed that defendant owned a garbage disposal business, that he was out of town, and that he would return on October 27. On the late afternoon or evening of that day a garbage truck stopped at a New Mexico Port of Entry and one of the occupants showed

the attendant a registration for a 1973 Peterbilt. This information was communicated to the FBI and the State Police.

About 10:30 p.m., State Officer Rodriguez stopped a garbage truck in or near Albuquerque. Dante was the driver and defendant the passenger. Heavy snow was falling at the time. The officer could not read the license because it was covered with dirt and slush and the lighting was faulty. Defendant showed him the truck registration for a 1973 Peterbilt. The officer told defendant that he wanted to check the truck further and suggested that the truck be driven to the State Police headquarters a short distance away. Defendant agreed and Dante drove the truck to the headquarters where it was examined. The officers observed the October 22 inspection sticker which was inconsistent with the defendant's statements that the truck had been in the East for approximately a month. Defendant was given a warning of his rights and interrogated briefly. He and Dante were then taken to their homes by officers. A prompt inquiry established that the truck was the 1976 Crane Carrier stolen in New York a few days previously.

The first trial of this case resulted in a hung jury. Before that trial, defendant moved to suppress the evidence obtained by the stopping of the truck on the highway. Defendant attacks the denial of that motion. The tip was sufficiently corroborated to justify the stopping of the truck. The request that the truck be driven to the police headquarters was reasonable, United States v. Self, 10 Cir., 410 F. 2d 984, 986, and the defendant consented. Defendant's action was consistent with his claim that he did not know that the the truck was stolen and thought that it was his rebuilt Peterbilt. The record has no evidence of threats or coercion and defendant was not under arrest. The testimony of the officers pertained to matters

in plain view. The actions of the officers were proper. See Davida v. United States, 10 Cir., 422 F. 2d 528, 531. The trial court did not err in denying the motion to suppress.

The FBI obtained and executed a search warrant covering defendant's premises. The search disclosed various items from a Peterbilt truck which had been buried. We upheld the validity of the search in United States v. Marcello, 10 Cir., 570 F. 2d 324. Defendant now attacks the validity of that decision and asks us to reconsider it. We decline to do so.

Government witness Nelson testified as to statements made to him by defendant about ten months before the incidents with which we are concerned. The substance of the statements was that to obtain a new car, a person could get a junk car, go through the paper work and give it to another who would steal a new car. Defendant says that the witness did not say what the prosecution claims. This point was resolved against the defendant by our unpublished opinion in No. 78-1901, United States v. Marcello, filed October 9, 1979. Next, defendant contends that the statement was inadmissible hearsay. We do not agree. The statement referred to an admission by the defendant and was admissible under F. R. Evi. Rule 801(d)(2)(A). See also United States v. Coppola, 10 Cir., 479 F. 2d 1153, 1161-1162. Further it described the very plan or scheme used by defendant in obtaining the stolen truck. Evidence of plan and knowledge is admissible. United States v. Parnell, 10 Cir. 581 F. 2d 1374, 1384, cert. denied 439 U. S. 1076.

Defendant argues that the prosecutor exceeded permissible grounds in his closing arguments to the jury. Defense counsel objected to various statements and moved for a mistrial. The case was hard fought and aggressively

argued. In a closing argument a prosecutor is not "confined to such detached exposition as would be appropriate in a lecture," United States v. Wexler, 2 Cir., 79 F. 2d 526, 530, cert denied 297 U. S. 703, because "[t]o shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice." DiCarlo v. United States, 2 Cir., 6 F. 2d 364, 368, cert. denied 268 U. S. 706. Berger v. United States, 295 U. S. 78, 88, says that a prosecutor "may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." An advocate is "permitted considerable latitude in replying to his opponent's arguments." United States v. Lawler, 7 Cir., 413 F. 2d 622, 628, cert. denied 396 U. S. 1046.

The prosecutor referred to the salvage-stolen car method of obtaining a car and said, "Every one in New York knows about the [scheme]. I think the message that ought to be sent back to New York is that you can't do it in New Mexico." The comment on social attitude should not have been made as it had nothing to do with the evidence in the case. In United States v. Gilbert, 10 Cir., 447 F. 2d 883, 886, we considered social consequence comments, to which no objection was made and which were more blatant than those in the instant case, and held that the defendant's substantial rights were not affected. As said in Aiuppa v. United States, 10 Cir., 393 F. 2d 597, 601, cert. denied 404 U. S. 871, "every slight excess of the prosecutor does not require that a verdict be overturned and a new trial ordered." The statement applies here.

Other objections to the prosecutor's argument relate to matters which had a basis in the evidence. A prosecutor has "reasonable latitude in drawing inferences from

the record in his closing argument." United States v. Nolan, 10 Cir., 551 F. 2d 266, 274, cert denied 434 U. S. 904. The trial court carefully instructed the jury that the remarks and arguments of the lawyers are not to be considered as evidence. We find nothing in the closing arguments of the prosecutor which unfairly affected defendant's rights.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JANUARY TERM—February 20, 1980

No. 78-1538
(D. C. No. CR-76-226)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PETER MARCELLO,
Defendant-Appellant.

Before Honorable William E. Doyle, Honorable Jean S. Breitenstein and Honorable James K. Logan, Circuit Judges

---

JUDGMENT.

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. It is the further order of this court that Peter Marcello, appellant, shall, within ten (10) days from and after the date of the filing of the mandate of this court in the district court, surrender himself to the custody of the United States Marshal for the District of New Mexico in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, *Clerk*

Certified a True Copy of the original filed in my office.

Jesse Casaus, *Clerk*
(Illegible) *Deputy*

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH TERM—March 27, 1980

No. 78-1538

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PETER MARCELLO,
Defendant-Appellant.

Before Honorable Oliver Seth, Chief Judge, Honorable Jean S. Breitenstein, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

ORDER DENYING REHEARING EN BANC.

This matter comes on for consideration of the petition for rehearing and suggestion en banc filed by the appellant in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Doyle, Breitenstein and Logan, to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and

no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS,
Howard K. Phillips, *Clerk*

UNITED STATES DISTRICT COURT
NEW MEXICO

DOCKET NO. 76-226

UNITED STATES OF AMERICA,

v.

PETER MARCELLO,

Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER.

(Filed June 9, 1978)

In the presence of the attorney for the government the defendant appeared in person on this date, June 9, 1978 WITH COUNSEL, Scott McCarty, Ret.

Plea—not guilty.

There being a verdict of GUILTY.

Defendant has been convicted as charged of the offense(s) of 18 USC 2312-Interstate Transportation of a Stolen Motor Vehicle; 18 USC 2-Aiding and Abetting.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General on his authorized representative for imprisonment for a period of FIVE (5) Years.

U. S. District Judge H. VEARLE PAYNE

CERTIFIED a True Copy of the original filed in my office. Jesse Casaus, Clerk.

/s/ LAURA CANDELAIRA
Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
ALBUQUERQUE, NEW MEXICO 87103

H. VEARLE PAYNE
Chief Judge

December 14, 1976

Mr. Scott McCarty
Attorney at Law
P. O. Box 568
Albuquerque, New Mexico

Mr. Victor R. Ortega
United States Attorney
United States Court House
Albuquerque, New Mexico

RE: USA v. Marcello
No. 76-226 Criminal

Gentlemen:

I have decided not to suppress the evidence in the above styled case. I had wanted to write an opinion but I haven't had time. Consequently, I will just file a copy of this letter in the file.

It is not as close a question as I thought it was and there appears to be several cases that have passed on similar situations. The closest one that I could find is in the Criminal Law Reporter, Vol. 20 No. 5 at page 2103.

The opinion cites a number of cases. One of them is cited for the proposition that even if the officer did have probable cause when he approached the car he did have an "articulable reason" for an "investigative confrontation."

Will the United States please prepare and submit to the Court an order carrying out this decision so that it may be signed before the case is tried.

Sincerely,

/s/ H. VEARLE PAYNE
H. Vearle Payne
U. S. District Judge

cc: Clerk, U. S. District Court

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

CRIM. NO. 76-226

UNITED STATES OF AMERICA,
Plaintiff,

v.

PETER MARCELLO and
BENJAMIN L. DANTE,
Defendants.

ORDER.

(Filed December 17, 1976)

This matter having come on for hearing before the Court on defendants' motion to suppress and the Court having heard the arguments of counsel and having heard the evidence presented and being duly advised in the premises, finds that the motion is not well taken.

IT IS, THEREFORE, ORDERED that the defendants' motion to suppress is denied.

DATED at Albuquerque, New Mexico, this 17th day of December, 1976.

/s/ H. VEARLE PAYNE,
H. Vearle Payne,
United States District Judge.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

No. 76-226 Cr.

UNITED STATES OF AMERICA,
Plaintiff,

v.

PETER MARCELLO,
Defendants.

ORDER.

(Filed February 11, 1977)

THIS MATTER having come before the Court on defendant's Motion to Suppress, and the Court having heard arguments of counsel and being otherwise fully advised in the premises.

HEREBY ORDERS that defendant's Motion to Suppress evidence which was seized as a result of the stop and arrest of defendant on October 27, 1976 is hereby denied.

THE COURT FURTHER ORDERS that all evidence seized as a result of the search of defendant's premises on October 29, 1976 in pursuance of a search warrant issued on October 29, 1976 is hereby suppressed.

/s/ H. VEARLE PAYNE,
United States District Judge.

APPROVED:

Counsel for Plaintiff.

Counsel for Defendant.